

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the License and Application for Licensure of Joel Wells	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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The above matter was heard by Administrative Law Judge Richard C. Luis (ALJ) at the Office of Administrative Hearings in Minneapolis on June 25 and August 24, 2005. The record closed on October 18, 2005, with the receipt of the Reply Brief from counsel for the Department of Commerce.

Michael J. Tostengard, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared for the Minnesota Department of Commerce ("Agency", "Department"). Rick E. Mattox, Esq., Mattox Law Office, 16770 Franklin Trail, Prior Lake, MN 55372, appeared on behalf of Joel Wells ("Applicant", "Licensee", "Respondent").

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Murphy, Deputy Commissioner, Minnesota Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, MN 55101 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed on the Respondent's real estate salesperson's license. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUE

Is it appropriate to take disciplinary action against the real estate salesperson's license of Joel Wells and to deny Mr. Wells's application for an insurance producer license for filing of a false application for real estate licensure, for filing an incomplete application for insurance licensure, and because of his conviction for possession of child pornography?

Based on all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On December 9, 2003, Joel Wells filed an application with the Department for licensure as a real estate salesperson. In answer to question number four, on page two of the application, Mr. Wells checked the "No" box for the question "Have you ever been charged with, or convicted of, or been indicted for, or entered a plea to, any criminal offense (felony, gross misdemeanor or misdemeanor), other than traffic violations, in any State or Federal Court?"¹

2. On August 12, 2003, Joel Wells pleaded guilty in Dakota County District Court to a gross misdemeanor for possession of pornographic work involving minors, in violation of Minn. Stat. § 617.247, subd. 4. Mr. Wells was fined \$750, sentenced to two years' probation, ordered to remain law abiding and to submit proof of counseling to the court within 30 days of sentencing.²

3. After making his initial application for a real estate salesperson license, Mr. Wells was granted his licensure. On May 14, 2004, Mr. Wells applied again to the Department for a real estate salesperson license transfer, due to a change in sponsoring brokers. On this application, Mr. Wells disclosed that he had pleaded guilty to a gross misdemeanor "resulting from unknowingly possessing 4 digital images of a minor in sexually explicit poses."³

4. On August 14, 2004, Mr. Wells filed an application for an insurance producer license. He answered "Yes" to the question on page two which asks whether he had ever been charged with or convicted of any criminal offense in court, including gross misdemeanors, but not including misdemeanor traffic violations. In response to a question on the application asking for a written statement explaining the circumstances, Mr. Wells submitted a letter stating that "The charges were wrong. As acknowledged by the prosecution there was 4 possible photos that I had never seen before. This was a

¹ Ex. 2.

² Ex. 1.

³ Ex. 3.

case of an overzealous police officer trying to make a career by writing up a complaint that was full of lies.”⁴

5. Mr. Wells’s 2004 applications for transfer of his real estate salesperson license and for his initial insurance producer license resulted in separate investigations into the circumstances by officials of the Minnesota Department of Commerce. The Department informed Mr. Wells subsequently that it was commencing disciplinary action against his real estate salesperson license and denying his application for an insurance producer license. Mr. Wells then filed the appeal that started this hearing process.

Based on the Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 45.027, 60K.43 and 82.35.

2. The Respondent was given timely and proper notice of the hearing in this matter.

3. The Department has complied with all procedural requirements of law.

4. Mr. Wells’s guilty plea to possession of pornographic work involving minors under Minn. Stat. § 617.247, subd. 4, constitutes a plea of guilty to a gross misdemeanor involving moral turpitude within the meaning of Minn. Stat. § 60K.43, subd. 1(6) and constitutes engaging in an act demonstrating that he is unqualified to act under the authority of licenses granted by the Commissioner of Commerce (including a real estate salesperson’s or an insurance producer’s license) within the meaning of Minn. Stat. § 45.027, subd. 7(4).

5. In checking the box asking for information about his criminal background “No” on his initial application for a real estate salesperson’s license, Mr. Wells has submitted a false application for licensure in violation of Minn. Stat. § 82.35, subd. 1(2)(a).

6. By filing a false application for a real estate salesperson’s license, Mr. Wells demonstrated untrustworthiness in violation of Minn. Stat. § 45.027, subd. 7(a)(4).

7. Mr. Wells’s limited response to a question asking for the circumstances of his criminal conviction in connection with his application for an insurance producer’s license constitutes the provision of incomplete information on an application in violation of Minn. Stat. § 60K.43, subd. 1(1).

8. Disciplinary action against Mr. Wells’s real estate salesperson’s license and a denial of his application for an insurance producer’s license are both in the public interest within the meaning of Minn. Stat. § 45.027, subd. 7(a)(1).

⁴ Ex. 4.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that disciplinary action be taken against the real estate salesperson's license of Joel Wells and that Mr. Wells's application for an insurance producer's license be denied.

Dated this 16th day of April, 2011

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

Reported: Taped (2 tapes) transcript prepared

MEMORANDUM

The Administrative Law Judge is persuaded that Mr. Wells, in answering "No" to the question regarding his criminal background on his initial application for real estate license, filed a false application and demonstrated his untrustworthiness. Mr. Wells explained that the application was filled out in haste, but the answer to the question is so obvious (he made his guilty plea only a few months before signing the application) that his excuse for filing the false information (haste or inadvertence) does not ring true. The filing of a false application for real estate licensure, which, in effect, concealed the Applicant's recent criminal background also demonstrates untrustworthiness, which is a separate ground for disciplinary action.

A separate, and stronger ground for discipline of Mr. Wells's real estate salesperson's license and denial of his application for licensure as an insurance producer, lies in his pleading guilty to the possession of pornographic work involving minors. The plea represents Mr. Wells's admission to an act of "moral turpitude" within the meaning of the relevant governing statutes. While "moral turpitude" is not defined in the statutes governing licenses issued by the Commissioner of Commerce, *Black's Law Dictionary*, Sixth Edition (1990) at pages 1008-1009 defines the concept as an "Act of baseness, vileness or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rules of right and duty between man and man", and an "Act or behavior that gravely violates moral sentiment or accepted moral standards of (the) community". That legal dictionary also notes, that in a criminal context, moral turpitude involves the "quality of a crime involving grave infringement of moral sentiment of the community...". By these definitions, the possession of child pornography is clearly a crime involving "moral turpitude" within the meaning of Minn. Stat. § 60K.43, subd. 1(6) and an act demonstrating that the Applicant or Licensee is unqualified to act under the authority or license granted by the

Commissioner of Commerce (including a real estate salesperson's or an insurance producer's license) within the meaning of Minn. Stat. § 45.027, subd. 7(4).

Mr. Wells points out that he was not informed during his real estate examination preparatory course that sex offenses constituted "moral turpitude" within the meaning of the governing statute. He emphasizes that only infractions such as lying, cheating and theft and other financial improprieties constituted "moral turpitude" in the instructions given to students preparing for the exam.⁵ While that may be, there is no indication that the types of behavior warned against by Mr. Wells's instructors in real estate class constitute the outer limits of conduct that can constitute moral turpitude. Our society and the Minnesota Legislature both have condemned the possession of pornographic material depicting sexual activity by or with minors, and the Legislature passed Minn. Stat. § 617.247 to make such possession criminal. Clearly the act of possessing such material is condemned because of the inherent base conduct and depravity involved as elements of the offense. As noted earlier, baseness and depravity are benchmarks of moral turpitude, by any commonly accepted measure.

The filing by Mr. Wells of information tending to lessen the significance of his actions in response to the Department forms constitutes also the filing of an incomplete application in violation of Minn. Stat. § 60K.43, subd. 1(1). The application for an insurance producer's license asks for anyone who checked "Yes" to having had a conviction for a gross misdemeanor to provide a written statement explaining the circumstances of the incident, a copy of the charging document, a copy of the official document which establishes the resolution of the charges or any final judgment and, if currently on probation, to attach a letter from the probation officer stating compliance with the terms of probation. Mr. Wells submitted only his own statement that the charges were wrong, that the facts of the case involved photos he had never seen before, and that he was victimized by an over-zealous police officer. Standing alone as documentation explaining the circumstances of his guilty plea, that bare submission is certainly "incomplete information" within the meaning of the statute. In connection with the application for renewal of his real estate license, Mr. Wells provided the Department with the documents constituting Exhibit 1 (the Sentencing Order, checks establishing that fines and assessments had been paid and that Mr. Wells had paid for counseling, and the initial Complaint in the possession of child pornography case) at the request of the Department's investigator (Ms. Kosmalski).⁶ The record is silent on whether those documents were supplied separately to the investigator handling the insurance producer's license application, Mr. Banks. Even if Mr. Wells did supply them, the ALJ is of the opinion that, taken together, they do not constitute all that the Department asked for in connection with question five on page two of the application for licensure as an insurance producer. That is, there is no letter from Mr. Wells's probation officer stating his compliance with the terms of probation. The application for licensure was still incomplete in the sense that it did not comply fully with all that the Department asked for on the application form, so it is concluded that the record establishes an incomplete licensing application which can stand as another ground for disciplinary action. **R.C.L.**

⁵ Transcript, 8/24/05, p. 12.

⁶ Transcript, 6/25/05, p. 27.